

# Antemortem Probate: A Mediation Model

DARA GREENE

## I. INTRODUCTION

As the old saying goes, “you can’t take it with you.” The “it,” of course, is the property and wealth accumulated by an individual during the course of her lifetime. The question of what to do with a decedent’s property has been answered by the rules of probate law, but a collection of laws cannot solve all the problems that arise when family and money are brought together. The immense grief caused by the death of a loved one, coupled with prolonged probate procedures, can leave any family in disarray, if not totally destroyed. Added to the confusion that surrounds the death of a loved one is the possibility of family friction when the contents of the decedent’s will are revealed. A bitter will contest can divide even the most secure families. A possible solution to these problems has been proposed in the form of antemortem probate.

Antemortem or “living” probate allows an individual to open his will to all charges of invalidation while he is still alive. The individual would petition the probate court, which would notify all possible heirs of the “contest.” If the testator is proved to have the necessary capacity and it cannot be determined that the testator was subject to fraud or unduly influenced, then the will stands as valid and protected from all further attacks after death.<sup>1</sup>

The answers supplied by antemortem probate are balanced by a number of problems. As it stands today, only three states—Ohio, Arkansas, and North Dakota—have antemortem probate statutes.<sup>2</sup> Antemortem probate has been criticized by many scholars, yet a number of models have been proposed to encourage its use in the United States. The use of mediation in antemortem probate matters could address the criticisms of current models while retaining their benefits. This Note will examine the current models of antemortem probate and their criticisms and discuss the benefits of a mediation model.

## II. PROBLEMS IN PROBATE

One of the comforting aspects of creating a will is that the testator knows exactly where his property will go. In fact, the orderly disposition of personal

---

<sup>1</sup> For an introductory discussion of living probate, see LAWRENCE W. WAGGONER ET AL., *FAMILY PROPERTY LAW* 241–242 (2d ed. 1997).

<sup>2</sup> See *id.*

wealth is one of the goals of the probate system.<sup>3</sup> Application of probate rules to real world situations, however, does not always produce the results desired by the testator, and quite often produces disorder.<sup>4</sup> Two of the largest problems with modern probate are the inability of the will to secure the wishes of the testator and the will contest.

### A. *Preserving the Testator's Intent*

While it is important to recognize the intent of the testator when determining the distribution of assets, preservation of will formalities is also a valuable consideration.<sup>5</sup> The testator faces the following two dilemmas: will the probate court interpret the will in the manner she intended and will the probate court overrule her intent because of drafting errors? Balancing will formalities with testator intent has been the battle of modern probate for years.<sup>6</sup>

The most difficult obstacle in determining the testator's intent in conventional postmortem probate is the fact that the best witness to the meaning of the will, the testator, is dead.<sup>7</sup> When a court wishes to determine

---

<sup>3</sup> See David F. Cavers, *Ante Mortem Probate: An Essay in Preventative Law*, 1 U. CHI. L. REV. 440, 440-445 (1934). Cavers also notes other goals of the system, including the need to protect the wishes of the testator and the necessity for formal structure within the procedure to convey the gravity of the process to the potential testator. See *id.*

<sup>4</sup> See *id.* Will formalities are necessary in order to give notice to the testator that the process upon which he is embarking is a serious one that carries weighty consequences. Cavers recognizes the need to retain some formalities in the system in order to effectuate this goal. See *id.*

<sup>5</sup> Strict adherence to formalities in the construction of wills has been at issue since the time of Henry VIII and the Statute of Wills. Modern American statutes are based on English law such as the Statute of Frauds of 1677 and the Wills Act of 1837. See WAGGONER ET AL., *supra* note 1, at 169. For a discussion of leniency in formality rules, see generally C. Douglas Miller, *Will Formality, Judicial Formalism and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 U. FLA. L. REV. 167 (1991).

<sup>6</sup> See Timothy R. Donovan, Comment, *The Ante Mortem Alternative to Probate Legislation in Ohio*, 9 CAP. U. L. REV. 717, 728 (1980). Examples of failed wills that captured the intent of the testator but neglected to adhere to will formalities are numerous. See, e.g., *Neal v. Royal (In re Estate of Royal)*, 826 P.2d 1236 (Colo. 1992) (invalidating a will because witnesses did not sign before the testator's death); *In re Winters' Will*, 98 N.E.2d 477 (N.Y. 1951) (ruling a will invalid because of improper placement of signatures); *Sears v. Sears*, 82 N.E. 1067 (Ohio 1907) (invalidating a will because the signature did not appear at the "end" of the will).

<sup>7</sup> See Donovan, *supra* note 6, at 718-719.

competency of the testator or, for example, the intended objects of certain gifts, it is forced to use evidence and testimony from indirect sources.<sup>8</sup> These witnesses will often hold a position contrary to the testator. For example, consider a daughter contesting her father's will. If the will as executed bars the daughter from receiving any property from her father's estate, should we trust the daughter's testimony on the subject of her father's competency? The existence of such a situation is "a glaring deficiency" in our modern probate system.<sup>9</sup> The greed of a relative is not the only impediment to accurately fulfilling the testator's wishes. Most wills are created far in advance of the testator's death.<sup>10</sup> Because of the passage of time, evidence of competence, intent, and freedom from fraud will be hard to acquire.<sup>11</sup> Witnesses' memories will not be as sharp as they once were. Evidence may be destroyed or lost. These problems are created solely from the practice of contesting wills after the death of the testator.<sup>12</sup>

The testator must also comply with will formalities. Many wills have been invalidated due to the fact that the testator did not secure the correct number of witnesses or sign the document at the correct spot.<sup>13</sup> Although these requirements might appear too harsh, the importance of maintaining the integrity of the will as a formal legal document trumps such concerns.<sup>14</sup> Once

---

<sup>8</sup> See Gerry W. Beyer, *Pre-Mortem Probate*, PROB. & PROP., July/Aug. 1993, at 6, 7. Beyer mentions that most of the evidence of a testator's intent will come from inferences gathered by third parties. Another source of evidence of intent could include letters or other documents written by the testator. See *id.*

<sup>9</sup> *Id.* Beyer also speaks of motivations other than greed behind the attacks of malicious family members, including the desire to embarrass other family members with "skeletons . . . pulled from the family closet." Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 134-135 (1990).

<sup>10</sup> See Donovan, *supra* note 6, at 719.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See, e.g., *In re Estate of Peters*, 526 A.2d 1005 (N.J. 1987) (holding a will invalid because the witnesses to the will failed to sign it in sufficient time); *Jay v. Thrash (In re Estate of McKeller)*, 380 So. 2d 1273 (Miss. 1980) (finding that the testator did not fulfill the signature requirement, and thus, the will was invalid).

<sup>14</sup> See John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492-497 (1975). Professor Langbein notes that will formalities give the probate process an element of finality and completion. However, Professor Langbein also argues that although it is essential to retain will formalities in order to preserve the element of finality, admitting wills that are in substantial compliance with formalities might be a solution to unfair invalidation. See *id.* at 496-497.

again, the fact that wills are contested after the death of the testator prevents the true wishes of the testator from being followed.<sup>15</sup> Unfortunately for current will drafters, there is no room in our system to correct a document from beyond the grave.

### B. *The Will Contest*

Ironically, the desire to produce an orderly disposition of wealth may have produced a completely disorderly result—the will contest. The combination of temptingly large estates and the preponderance of the will contest should result in an inordinate use of the probate courts' resources.<sup>16</sup> The contests can be messy and emotionally scarring. As one scholar noted, "there is no form of civil litigation more acrimonious and more conducive to the public display of soiled linen and the uncloseting of family skeletons than is the will contest."<sup>17</sup> The prevalence of the will contest and the harmful effects that such a dispute have upon the family indicate the difficulties associated with postmortem probate.

A will contest is easily commenced and there are no real penalties for spurious claims.<sup>18</sup> The instigator of the action can claim that the testator did not have the capacity to make the will or was perhaps unduly influenced by an outsider with little or no repercussions; a losing claimant against the will does not have to reimburse the testator's estate for the cost it incurs in defending the contest.<sup>19</sup> As noted before, the best witness to the signing of the will, the testator, is not available to defend attacks in a postmortem contest. The added benefit of not having to confront the deceased while making a spurious claim can make the temptation even greater.<sup>20</sup>

---

<sup>15</sup> See Leopold & Beyer, *supra* note 9, at 136.

<sup>16</sup> See Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 572–574 (1997). Madoff notes the increased transfer of wealth within this country and recognizes the growing glamour of the will contest in high profile "media events." *Id.* Madoff recommends that the prominence of the will contest requires a heightened study of the doctrine of undue influence. *See id.*

<sup>17</sup> Cavers, *supra* note 3, at 441.

<sup>18</sup> See Tracy Costello-Norris, *Is Ante-Mortem Probate a Viable Solution to the Problems Associated with Post-Mortem Procedures?*, 9 CONN. PROB. L.J. 327, 333 (1995).

<sup>19</sup> See Leopold & Beyer, *supra* note 9, at 135. The authors also mention that the ease of initiating such a contest without penalty has led many handling testators' estates to settle without a fight in order to preserve the estate. *See id.* at 139.

<sup>20</sup> See Beyer, *supra* note 8, at 8. Whether genuinely or not, it is difficult to question the sanity or lack of capacity of a relative while the relative sits opposite you in the room.

A will contest also has the effect of dividing the family. An attack on the will by one family member might anger other family members, especially those who expect to take under the will. Litigation of disputes with strangers is painful and emotionally destructive enough. The addition of the complexities of family dynamics to the mix produces volatile and painful results.<sup>21</sup>

The litany of objections demonstrates the shortcomings of postmortem probate. While it seeks to effectuate the intention of the testator while preserving will formalities, conventional probate creates myriad obstacles and hardships for the testator and for the family members left behind. The problem of establishing the intent of the testator and his capacity to create a will is created by a lack of evidence. The testator is dead and all other evidence may be forgotten or lost. The possibility of an easy will contest is another concern of postmortem probate. Antemortem probate seeks to resolve these concerns.

### III. HISTORY OF ANTEMORTEM PROBATE

#### A. *English Common Law*

Modern antemortem probate has its roots in the English common law and the European civil law.<sup>22</sup> Under English common law, a will could be proved

---

When the testator has passed away, the discomfort of the situation is removed and the claimant may speak ill of the dead with ease. *See id.*

<sup>21</sup> *See* Brian C. Hewitt, *Probate Mediation: A Means to an End*, RES GESTAE, Aug. 1996, at 41, 41, 43. The fact that most families wish to maintain or continue their present relationships, the probability that most participants have embarrassing intimate knowledge of each other, and the emotional attachment that the participants have formed to items in question are some of the many problems involved in family disputes. *See id.*

<sup>22</sup> *See* Leopold & Beyer, *supra* note 9, at 149–152. In fact, the concept of antemortem probate extends back to the Old Testament. In their article, Leopold and Beyer mention the story of Ruth. Ruth was a widow who was being forced to marry one of her kinsman. *See id.* at 148–149. Like most arranged marriages, the couple had no feelings for each other and did not want to get married. Ruth wanted to marry another, Boaz, but her husband's estate would pass to her first-born son if she did not marry the man chosen for her. *See id.* at 149. Ruth's beloved decided to discuss this matter with the elders of the community and a kinsman, who had the right to marry Ruth and claim the estate. After much discussion and bartering, an arrangement was made whereby the first husband's estate would pass to Boaz. *See id.* There are other examples in the Bible of families using agreements to avoid the ancient laws of primogeniture, including Isaac conferring the right to his property to his son Esau before his death. Another example is the disinheritance of Reuben by Jacob because of a blackmail scam. *See id.*

before the death of the testator.<sup>23</sup> The document would then be registered and recorded, yet not made official by the office of the Ordinary, a judicial officer of the Ecclesiastical Courts who had "immediate jurisdiction" in probate matters.<sup>24</sup> Unlike modern antemortem probate, the document probably had little protection from being contested after the death of the testator because the changes made to the will before death had no element of finality.<sup>25</sup> The testator was free to change the document before his death without destroying the effect of registration. The testator did not have to repeat the process of will validation, he simply changed parts of the will itself.<sup>26</sup> Upon the rise of the Ecclesiastical Courts, the practice of securing wills before the death of the testator was abandoned, as the courts were deemed to have all authority over probate matters.<sup>27</sup>

### B. *Michigan Statute of 1883*

Antemortem probate began in the United States in Michigan in the 1880s.<sup>28</sup> In 1883, the Michigan legislature, concerned with the damaging effects of the will contest, drafted the Michigan Statute of 1883.<sup>29</sup> The statute provided for a testator to petition the probate court, which was then to determine the soundness of the will.<sup>30</sup> Heirs and others named by the testator would gather at a hearing during which the testator would prove that the will was executed "without fear, fraud, impartiality or undue influence and with full knowledge of its contents."<sup>31</sup> After the will was determined to be valid,

---

<sup>23</sup> *See id.*

<sup>24</sup> *See id.* In American legal history, some states referred to any officer of the court who had the power to make determinations on matters concerning wills as an "Ordinary." Today, the services of an administrator in closing and distributing the assets of the estate are deemed "ordinary services." BLACK'S LAW DICTIONARY 1097 (6th ed. 1990).

<sup>25</sup> *See* Leopold & Beyer, *supra* note 9, at 149-150. The authors note the dearth of evidence on the effect of antemortem determinations. *See id.* at 150.

<sup>26</sup> *See id.* The testator could also revoke the will without repeating the registration process or filing any additional documentation with the courts. *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See* Cavers, *supra* note 3, at 444.

<sup>29</sup> *See id.* While characterizing the statute as "clumsy," *id.*, Cavers notes that the Michigan statute was one of the first attempts in America to separate American testamentary law from English statutory precedent. Cavers also notes that the statute probably produced more contests than before its introduction. *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> 1883 Mich. Pub. Acts 25 § 2.

the probate judge would attach his decree to the will making the will impervious to all charges of lack of testamentary capacity.<sup>32</sup>

The Michigan statute was invalidated by an 1885 case, *Lloyd v. Wayne Circuit Judge*.<sup>33</sup> In that case, the testator tried to disinherit his wife and his son. Judge Cooley determined that because the wife was not given adequate notice of the antemortem probate hearing, the act was unconstitutional.<sup>34</sup> The court sought to protect the rights of the wife, not only for monetary reasons, but also because the will affected decisions involving the care of her children.<sup>35</sup> Judge Cooley noted, "A wife's interests in her husband's estate are not likely to be purely selfish and personal; the two co-operate in accumulating it, generally with an object in view that eventually it shall benefit children or others to whom they are mutually attached."<sup>36</sup> Judge Cooley also noted that the antemortem hearing provided no finality of judgment because the testator was free to change the will after the hearing.<sup>37</sup> It was the death knell for the Michigan Statute of 1883.<sup>38</sup>

---

<sup>32</sup> See Cavers, *supra* note 3, at 444. The finding of the judge would be set forth in a decree that would have the same effect as a postmortem decree of capacity. The findings of the judge could still be appealed, however, as in any postmortem decree. See Leopold & Beyer, *supra* note 9, at 153.

<sup>33</sup> 56 Mich. 236 (1885); see Costello-Norris, *supra* note 18, at 329. The effectiveness of the statute during the two years before *Lloyd* was never really determined. As Cavers mentions, "the statute was soon put to [the] judicial test." Cavers, *supra* note 3, at 444.

<sup>34</sup> See *Lloyd*, 56 Mich. at 237. The grounds for the statute's invalidation were those of due process. Because only heirs mentioned in the will were served notice of the antemortem procedure, the wife of the testator was not provided with notice and an opportunity to be heard. See *id.*

<sup>35</sup> See *id.* at 238. The court specifically mentioned the right of the children to potentially benefit from the accumulated wealth of the estate and the fact that wills usually provide for the guardianship of minor children. See *id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* at 239.

<sup>38</sup> See Leopold & Beyer, *supra* note 9, at 155. Although testators could not seek validation of their wills under the Michigan statute, Leopold and Beyer note that the use of declaratory judgments preserved the hopes of anxious testators in many states. The issue of whether an antemortem probate determination was a valid "case or controversy" was raised as a barrier to declaratory judgments, but the Supreme Court determined that declaratory judgments were valid cases or controversies in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). Despite this ruling, today many states are still hesitant to recognize declaratory judgments as a tool for settling probate disputes before death. See Leopold & Beyer, *supra* note 9, at 159.

*C. National Conference of Commissioners on Uniform State Laws*

The decision of the Michigan court led to a hibernation of antemortem probate. In the 1930s, interest was revived when the National Conference of Commissioners on Uniform State Laws (Commissioners or National Conference) met to create a uniform antemortem probate of wills act.<sup>39</sup> The committee involved with drafting the proposed act came up with two possible procedures.<sup>40</sup> The first method was simple, the testator would merely deposit the completed will with the clerk of courts.<sup>41</sup> The second method was much more involved.<sup>42</sup> The testator would file a petition with the clerk of courts in which he would provide the names of his spouse, if any, and any presumptive heirs to the will.<sup>43</sup> The court would then issue service to the named defendants, the heirs, and if the heirs could not be found then publication would be used.<sup>44</sup> After completion of service, a hearing would take place that would determine the validity of the will.<sup>45</sup> Once the will was declared valid, the will was sealed and no further changes to the will could be made.<sup>46</sup> This method is much like modern probate; however, it was never implemented.<sup>47</sup> The Commissioners could not agree upon whether to use method one or two, and this discord, combined with the feeling that they were creating new law, led the Commissioners to abandon the project.<sup>48</sup>

---

<sup>39</sup> See Leopold & Beyer, *supra* note 9, at 161. Leopold and Beyer note that the demise of the Michigan statute was first met with disenchantment, then disinterest. Indeed, the question of probate matters does not seem to invoke a passionate response today, despite the emotionally-charged subject matter of family relationships.

<sup>40</sup> See Costello-Norris, *supra* note 18, at 332.

<sup>41</sup> See Leopold & Beyer, *supra* note 9, at 161.

<sup>42</sup> See Costello-Norris, *supra* note 18, at 332.

<sup>43</sup> See Leopold & Beyer, *supra* note 9, at 161.

<sup>44</sup> See *id.*

<sup>45</sup> See *id.* at 162.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.* Leopold and Beyer mention that the Commissioners were doomed from the start. Research compiled by the Commissioners showed that no state had a "true" antemortem probate procedure and the introduction of a detailed model perhaps shocked observers into harsh criticism. Although the first model, simple and understated, may have created problems of notice and finality, it may have proved to be a smaller "jump" for the states to make. See *id.* at 161 n.160.

<sup>48</sup> See *id.* at 162.



#### IV. MODERN ANTEMORTEM PROBATE MODELS AND CRITICISM

Despite the failings of the National Conference, antemortem probate became a popular topic for debate among authors in the late 1970s and early 1980s. The result was the formation of the following three models of antemortem probate: the Contest Model, the Conservatorship Model, and the Administrative Model.

##### *A. The Contest Model*

The Contest Model is the model that most resembles the Michigan Statute of 1883.<sup>49</sup> Proposed by Professor Howard Fink of The Ohio State University, the Contest Model seeks to place the testator and his presumptive heirs in an adversarial position.<sup>50</sup> Like the Michigan statute, the testator would begin the process by petitioning the probate court for a decision declaring the validity of the will.<sup>51</sup> All persons with an interest in the will, including spouses and individuals named in the will, would be notified of the proceeding.<sup>52</sup> Taking note of the constitutional notice problems raised by the Michigan statute, Professor Fink's model provides for personal service for participants within the state of controversy, service by registered mail for individuals outside of the state, and notice by publication for all individuals unable to be located.<sup>53</sup> Any individual not present at the hearing, including future takers, would be represented by a "virtual representative," or guardian ad litem.<sup>54</sup> The court would then determine if the will was correctly signed, if the testator had capacity, and if the requisite number of witnesses had been obtained.<sup>55</sup> Upon

---

<sup>49</sup> See Costello-Norris, *supra* note 18, at 334.

<sup>50</sup> See *id.*

<sup>51</sup> See Howard Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264, 275 (1976).

<sup>52</sup> See *id.* at 276.

<sup>53</sup> See *id.* at 274-275.

<sup>54</sup> See *id.* at 276. The guardian ad litem usually represents one side of a controversy, such as a minor or incapacitated individual in a will dispute. See BLACK'S LAW DICTIONARY 706 (6th ed. 1990). The fact that a guardian ad litem could be representing the interests of more than one taker, such as an unborn or remote individual who could take by intestacy, does not present a great problem to Professor Fink. He rationalizes that the interests of those contesting the will are not that different, because they are all contrary to the testator. See Fink, *supra* note 51, at 276.

<sup>55</sup> See Fink, *supra* note 51, at 276.

a finding of validity, the will would be secured and filed with the court. Responding to one of the criticisms of the Michigan statute, the Contest Model does not allow the testator to make changes to the will after the hearing.<sup>56</sup> This feature gives the model an element of finality.

The Contest Model, which is currently used by the State of Ohio, has faced strong criticism.<sup>57</sup> The largest concern with observers of the model is that the will must become part of the public record.<sup>58</sup> The testator must also face the recipients or, more importantly, the nonrecipients of his estate in court. It may be difficult for the testator to tell his loved ones that they are not going to receive exactly what they expected to receive.<sup>59</sup> The Contest Model calls for lengthy litigation that could seriously deplete the funds of the estate. A prospective heir could find himself fighting a battle for an estate that may no longer exist after the end of the litigation.<sup>60</sup> The heir may also be wary of engaging the testator in an adversarial match for fear that the testator will reduce his portion of the estate out of spite.<sup>61</sup> The bottom line of the Contest Model is that it is a contest, a vicious feud that can only lead to feelings of resentment between family members.<sup>62</sup>

---

<sup>56</sup> See *id.* Professor Fink addresses many constitutional issues posed by the invalidation of the Michigan statute in his model, including the problem of notice; the question of whether the matter is a proper justiciable issue; and the concern for the lack of separation of powers, given the almost judicial power the legislature would hold in creating an antemortem statute. See *id.* at 274-275.

<sup>57</sup> See Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1073 (1980). Only the following three states enacted antemortem probate statutes in the late 1970s: Ohio, Arkansas, and North Dakota. No other state enacted antemortem probate legislation after the first three were created. All three models are contest models. See Leopold & Beyer, *supra* note 9, at 169-170.

<sup>58</sup> See Costello-Norris, *supra* note 18, at 336.

<sup>59</sup> See Fellows, *supra* note 57, at 1073.

<sup>60</sup> See *id.* The simple truth exists that any money that is drained from the testator's coffers during life will not be there at death.

<sup>61</sup> See *id.* at 1073-1074.

<sup>62</sup> Professor Fink notes the problem of family discord at the outset of his article, then later shrugs the problem off at his conclusion. "Would this disrupt families? Certainly. But any more so than would a will contest after the testator has died and can no longer defend his sanity or correct any mistakes in executing the will?" Fink, *supra* note 51, at 289. Although the response is honest, it points to the largest problem with the Contest Model—family discord.

## B. *The Conservatorship Model*

Developed by Professor John H. Langbein, the Conservatorship Model addresses some of the criticisms leveled at the Contest Model.<sup>63</sup> Under this model, the testator would once again petition the probate court for a determination of the validity of her will.<sup>64</sup> Instead of facing her presumptive heirs in court, however, the testator would confront a guardian ad litem.<sup>65</sup> The guardian would be an appointed conservator who would represent the claims of the heirs.<sup>66</sup> The appointment of a guardian produces two benefits. First, the presumptive heirs have the relief of anonymity.<sup>67</sup> Second, the guardian ad litem may be in a better position to recognize legal issues that may arise during the contest of the will.<sup>68</sup> Determination of the validity of the will would continue much like the Contest Model, but normal rules of revocation and alteration would affect the will.<sup>69</sup>

Although the Conservatorship Model solves some of the problems of the Contest Model, including the problem of confrontation, the Conservatorship Model has faced its share of criticism as well.<sup>70</sup> The first problem is that the guardian ad litem will have to represent many parties, including individuals who have competing interests, making it difficult or impossible for the guardian to represent effectively all interests involved.<sup>71</sup> Second, the appointment of the guardian ad litem is at the testator's expense.<sup>72</sup> This added

---

<sup>63</sup> See Gregory S. Alexander & Albert M. Pearson, *Alternative Models of Antemortem Probate and Procedural Due Process Limitations on Successions*, 78 MICH. L. REV. 89, 91-92 (1979).

<sup>64</sup> See John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 77 (1978).

<sup>65</sup> See *id.* at 78.

<sup>66</sup> See *id.*

<sup>67</sup> See Costello-Norris, *supra* note 18, at 336. As mentioned before, it is very difficult to challenge the capacity of a relative in open court.

<sup>68</sup> See Alexander & Pearson, *supra* note 63, at 91.

<sup>69</sup> See *id.* at 92.

<sup>70</sup> See Fellows, *supra* note 57, at 1075.

<sup>71</sup> See Costello-Norris, *supra* note 18, at 336. For example, two or more parties may have an interest in a particular item from the estate. Each party may present conflicting testimony on whom the testator intended to receive specific items or each party may claim that the other exerted undue influence upon the testator.

<sup>72</sup> See *id.* If the guardians ad litem, or conservators, are paid by the testator, how effective will they be in representing the interests of others? Of course, the conservators

financial burden could discourage the testator from even initiating the proceeding. Third, some have argued that the guardian ad litem does not fully ensure confidentiality of the contesting parties.<sup>73</sup> The testator will already have an idea as to who may object to the contents of the will from the will itself; the addition of certain family documents presented by the guardian ad litem could tip the contesting parties' hand completely.<sup>74</sup> Last, the will is still an item of public record, which destroys any anonymity that the testator might desire.<sup>75</sup> The end result is similar to the Contest Model, an adversarial match that divides the family.

### C. *The Administrative Model*

The Administrative Model proposes an informal hearing that would remove the family from the hostility of the courtroom.<sup>76</sup> Developed by Gregory S. Alexander as a modification of Langbein's model, the Administrative Model begins similarly to the two previous models, with the testator's petition to the court for a declaration of validity of the will.<sup>77</sup> The hearing regarding the will would take place in camera, so that the will does not need to become a matter of public record.<sup>78</sup> A guardian ad litem would also be present to assist the judge in determining the capacity of the testator and other matters of will formality.<sup>79</sup> No notice would be given to presumptive heirs, as they would be represented by the guardian ad litem.<sup>80</sup>

---

are appointed by the court, so they are not "hired" by the testator but rather through the court.

<sup>73</sup> See Fellows, *supra* note 57, at 1075.

<sup>74</sup> See *id.*

<sup>75</sup> See *id.* at 1074-1075.

<sup>76</sup> See Gregory S. Alexander, *The Conservatorship Model: A Modification*, 77 MICH. L. REV. 86, 91 (1978). Although Gregory S. Alexander intended a mere modification of the Conservatorship Model in his 1978 article, his changes were significant enough to have resulted in a new model that has come to be known as the Administrative Model. See Alexander & Pearson, *supra* note 63, at 91; Fellows, *supra* note 57, at 1075.

<sup>77</sup> See Fellows, *supra* note 57, at 1076.

<sup>78</sup> See Alexander & Pearson, *supra* note 63, at 113.

<sup>79</sup> See *id.* Alexander makes no mention of who would absorb the cost of the guardian ad litem, but since the model was created as a response to the Conservatorship Model, an assumption is created that the testator would pay for the guardian ad litem's services. See *id.*

<sup>80</sup> See Fellows, *supra* note 57, at 1066. Once again, the specter of conflict of interest is raised; however, all interests share the similarity of being in opposition to the testator.

After a determination of validity, the will is executed.<sup>81</sup> The results of the hearing would not be binding in any subsequent dispute.<sup>82</sup> Alexander later modified his model to include a binding element, but did not address the problems of notice that have plagued other models.<sup>83</sup> The Administrative Model would involve only the judge and the guardian ad litem.<sup>84</sup> The judge would examine the will for any peculiarities and dispatch the guardian to collect any needed evidence from individuals involved.<sup>85</sup>

Many have attacked the Administrative Model as sacrificing certainty for the preservation of confidentiality.<sup>86</sup> If the model is seen as binding upon the parties, then the specter of the notice requirement raises its ugly head. If the model is employed in its nonbinding state, then the testator and his family suffer unnecessary hardship and expense with little confidence in the document's finality. Others are concerned that leaving the family in the dark would lead to curiosity about the contents of the will and perhaps feelings of resentment.<sup>87</sup>

All three models seek to repair the flaws of their counterparts, yet they create more problems than they solve. Perhaps the focus on creating an antemortem probate model should not rest on repairing existing models, but rather on developing a system that best suits the needs and requirements of the individuals involved—the testator and his family.

## V. ANTEMORTEM PROBATE AS APPLIED

The shortcomings of the three current models of antemortem probate are best illustrated by the fact that only three states currently utilize antemortem

---

<sup>81</sup> *See id.*

<sup>82</sup> *See* Alexander & Pearson, *supra* note 63, at 90. Although the results of the procedure are nonbinding, the authors note that the result of the administrative proceeding would produce a record of "considerable weight." Alexander and Pearson note that the administrative procedure also secures stronger evidence of the testator's intent and capacity for future litigation. *See id.* at 91.

<sup>83</sup> *See* Fellows, *supra* note 57, at 1076.

<sup>84</sup> *See id.*

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* at 1075–1076. The author notes that Alexander was preoccupied with the notion of confidentiality missing from Langbein's Conservatorship Model. The author further notes that Alexander felt that any antemortem statute without the element of confidentiality would be completely unsuccessful. *See id.*

<sup>87</sup> *See id.* at 1077.

statutes—Arkansas, North Dakota, and Ohio.<sup>88</sup> Antemortem issues have been successfully addressed in the European legal system where the notary is given great control over probate matters.<sup>89</sup> A comparison between the United States' adversarial style of antemortem and Europe's administrative model might explain the difference in frequency of use.

### A. *The United States*

The oldest antemortem statute in the United States is the North Dakota statute. At twenty-one years on the books, the statute is rarely used.<sup>90</sup> Like the Contest Model that serves as its foundation, the North Dakota statute calls for the validation of certain aspects of the will (capacity, formal requirements) in an adversarial procedure.<sup>91</sup> All persons named in the will, as well as those who would take under intestacy rules, are necessary parties to the proceeding.<sup>92</sup> Notice rules follow those of the North Dakota Civil Rules.<sup>93</sup> The statute has faced no real attack, perhaps due to its clear construction and lack of use.<sup>94</sup>

The Arkansas statute is the newest statute, created in 1979.<sup>95</sup> The Arkansas statute is based upon the North Dakota statute, with a more liberal

---

<sup>88</sup> See ARK. CODE ANN. §§ 28-40-201 to -203 (Michie 1987); N.D. CENT. CODE § 30.1-08.1 (1996); OHIO REV. CODE ANN. §§ 2107.081-.085 (West 1994). Each state statute employs the Contest Model. See *supra* note 57.

<sup>89</sup> See Leopold & Beyer, *supra* note 9, at 150. The notary is a "quasi-" judicial officer present in European civil law. The notary is usually a lawyer who has experience in the matter under dispute. See *id.* at 150.

<sup>90</sup> See *id.* at 169.

<sup>91</sup> See N.D. CENT. CODE § 30.1-08.1.

<sup>92</sup> See *id.* § 30.1-08.1-02. Takers under intestacy include the deceased's spouse, children, and lineal descendants. See *id.* § 30.1-04-03.

<sup>93</sup> See *id.* § 30.1-08.1-02. The section calls for accordance with Rule 4 of the North Dakota Rules of Civil Procedure, which states: "A court of this state may acquire personal jurisdiction over any person through service of process as provided in this rule or by statute, or by voluntary general appearance in an action by any person either personally or through an attorney or any other authorized person." N.D. R. Civ. P. 4(b)(4).

<sup>94</sup> See Costello-Norris, *supra* note 18, at 343. The statute provides guidance on almost all issues involved in antemortem probate including when, where, and how to initiate proceedings and the effect of other documents, such as subsequent wills, upon the validity of the decree. The fact that the statute fills in blanks with accepted rules and procedures such as the North Dakota Rules of Civil Procedure makes the statute more resistant to attack. See Leopold & Beyer, *supra* note 9, at 171.

<sup>95</sup> See *id.* at 174.

view on the revocation of the will.<sup>96</sup> The statute also grants a more general power to the court to determine the validity of the will as a whole rather than specific requirements of the will.<sup>97</sup> The statute has been characterized as "ignored"; perhaps this ignorance stems from testators' wishes to not disclose the contents of their wills.<sup>98</sup>

The Ohio antemortem probate statute has been utilized the most out of the three state statutes, but is not widely used.<sup>99</sup> The Ohio statute, based upon the Contest Model, is structured after the North Dakota statute. However, the Ohio statute is more detailed than the North Dakota and Arkansas statutes. The Ohio statute focuses much attention on the problems of service and notice.<sup>100</sup> In 1983, the statute survived a constitutional attack in the case of *Cooper v. Woodard*.<sup>101</sup> However, the statute sees relatively little use, and cases have involved determining the capacity of elderly testators who have executed wills through court-appointed guardians.<sup>102</sup>

---

<sup>96</sup> See *id.* The statute allows for revocation of the initial will by creation of a new will: "A finding of validity pursuant to this subchapter shall constitute an adjudication of probate. However, such validated wills may be modified or superseded by subsequently executed valid wills, codicils, and other testamentary instruments, whether or not validated pursuant to this subchapter." ARK. CODE ANN. § 28-40-203(b) (Michie 1987).

<sup>97</sup> See ARK. CODE ANN. § 28-40-202(a) (Michie 1987). "Any person who executes a will . . . may institute an action in the probate court of the appropriate county of this state for a declaratory judgment establishing the validity of the will." *Id.*

<sup>98</sup> Leopold & Beyer, *supra* note 9, at 175. Based upon the Contest Model, the Arkansas model does create a public record of the proceeding. See ARK. CODE ANN. § 28-40-203.

<sup>99</sup> See Leopold & Beyer, *supra* note 9, at 173.

<sup>100</sup> See OHIO REV. CODE ANN. § 2107.082 (West 1994). The statute provides detailed guidance on the steps necessary to serve process. The statute calls for notice by personal service, certified mail, or publication. See *id.*

<sup>101</sup> No. CA-1724, 1983 WL 6566 (Ohio Ct. App. July 27, 1983). The Ohio court decided that there was a valid controversy, see *id.* at \*1, and that the statute was presumed to be constitutional, see *id.* at \*2. The case involved the contest of the validity of a will by a woman, Woodard, named in the will. See *id.* at \*1. The court refused to find the decree invalid on constitutional grounds because state statutes are presumed constitutional. See *id.* at \*2. Woodard did not present any evidence to rebut this presumption. See *id.* Therefore, the court held the statute to be constitutional. See *id.*

<sup>102</sup> See, e.g., *Fischer v. Swartz*, No. 82-CA-71, 1983 Ohio App. LEXIS 12724 (Ohio Ct. App. Apr. 8, 1983); cf. *Horst v. First Nat'l Bank*, No. CA-8057, 1990 WL 94654 (Ohio Ct. App. June 25, 1990).

All three statutes have seen little use.<sup>103</sup> Some have contended that this is due to the fact that testators do not wish to have the contents of their wills revealed before their deaths.<sup>104</sup> The fact that most cases of antemortem probate in Ohio are brought by the guardians of testators<sup>105</sup> supports this view. A guardian may have little worry of upsetting his client's family and heirs and instead focuses on what is best for the testator. The complexity and emotional cost of the Ohio statute, burdened by heightened notice requirements, might also discourage use of the statute.

### B. France

The French *notaire* (notary) has a much more respected position in French society than our American notary enjoys.<sup>106</sup> The *notaire* is not just a rubber-stamping official, but a specialist of certain areas of law that the *avoué*, or advocate, does not control. These areas include many transactional aspects of law, such as probate and trust.<sup>107</sup> The *notaire* is a "quasi-judicial officer" who has the power to meet with the parties involved and determine capacity.<sup>108</sup> The ruling of the *notaire* is given great credibility and is difficult to overcome in a subsequent proceeding.<sup>109</sup> The *notaire* also has the power to meet with potential contestants of the will and discuss the difficulties that will be involved in such a contest.<sup>110</sup> The use of the *notaire* avoids a confrontational position while providing some amount of security to the testator.<sup>111</sup> The

---

<sup>103</sup> See Leopold & Beyer, *supra* note 9, at 170-175.

<sup>104</sup> See *id.* at 175.

<sup>105</sup> See *id.* at 174.

<sup>106</sup> See L. Neville Brown, *The Office of the Notary in France*, 2 INT'L & COMP. L.Q. 60, 60 (1953).

<sup>107</sup> See *id.* at 61.

<sup>108</sup> Leopold & Beyer, *supra* note 9, at 150.

<sup>109</sup> See *id.* at 151. Courts have great respect for the opinions of notaries in civil law jurisdictions. The notary is usually a lawyer, an expert in his field, and has knowledge of both sides of the controversy. In the area of probate specifically, notary decisions are difficult to overcome because of strict requirements regarding will revocation. Once a notary has placed his seal upon a will, a testator must formally revoke it before making any changes to the document. See *id.* at 150, 151.

<sup>110</sup> See Langbein, *supra* note 64, at 65. The *notaire* is often thought of as a family friend who seeks to end disputes peaceably by discouraging litigation. He has been characterized as "the trusted sharer of the innermost secrets of the family and often the peacemaker in its disputes." Brown, *supra* note 106, at 69. Discouraging family members from will contests would often occur in the daily operation of the *notaire*.

<sup>111</sup> See Leopold & Beyer, *supra* note 9, at 151.



parties do not argue in court and all matters are out in the open. The paternalistic role of the *notaire*, with explanations and recommendations for both sides, makes for family harmony rather than discord.

Much like the *notaire*, a mediator is an experienced individual who helps settle disputes. Although neither the *notaire* nor the mediator creates binding decisions on matters, their rulings are difficult to overcome because of the respect afforded to them by the courts.

## VI. MEDIATION AS A SOLUTION TO THE PROBLEMS OF ANTEMORTEM PROBATE

The use of mediation in the area of antemortem probate will result in a viable model that addresses the concerns created by the three antemortem probate models. Alternative dispute resolution methods, such as mediation, negotiation, and arbitration, are growing in popularity, especially in the field of commercial law. Family law, including divorce and elder law, has also seen a benefit from alternative dispute resolution techniques.

The piecemeal patch solutions offered by the existing antemortem probate models are not effective. The problems created by probate should be addressed holistically by attempting to preserve the relationships between family members and the society around them.

### A. *Benefits of Mediation*

Individuals have reported success in the use of the mediation processes generally,<sup>112</sup> but mediation is most effective when family and emotional issues are involved.<sup>113</sup> The specific benefits of mediation in the area of antemortem probate include privacy and confidentiality, the therapeutic effects for the

---

<sup>112</sup> See JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 11–13 (1990). Folberg and Taylor provide statistical evidence that most mediation participants receive satisfaction from the use of mediation. Studying 69 divorce cases in the American South, 91% of individuals studied felt satisfied with the mediated result, while only 50% of the litigation participants felt the same. See *id.* at 12. Mediation has produced similar results in other areas, including educational matters and neighborhood justice. See *id.* at 13.

<sup>113</sup> See Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 398 (1997). Gary feels that mediation is effective in family disputes because, unlike other forms of conflict resolution, mediation focuses on emotional issues and their consequences. See *id.* at 399.

participants, the preservation of the family, reduced costs, and the unique remedies allowed through the use of mediation.

Privacy and confidentiality have been major concerns in all three of the major antemortem probate models. The Administrative Model sacrifices finality for confidentiality while the Contest Model and the Conservatorship Model assure finality at the cost of exposure of the contents of the will. Probate mediation prevents the embarrassing possibility of having one's "skeletons" revealed to the general public that characterizes in-court procedures.<sup>114</sup> The testator may feel more comfortable about revealing the contents of the will in a setting that is not as formal or as adversarial an environment as the courtroom.

Another benefit of mediation in antemortem probate is the therapeutic effects that mediation provides.<sup>115</sup> An article on the benefits of "therapeutic jurisprudence" explained the growing movement among legal scholars to incorporate aspects of psychology and mental health into legal practice.<sup>116</sup> The article argued that the use of mediation in probate matters can help settle emotionally volatile situations.<sup>117</sup> Often family members feel resentment at being left out of the will or of having their share of the estate not meet their expectations. Mediation provides an arena to vent these frustrations. The satisfaction that accompanies mediation hearings may also lead to a decrease in appeals from the results of the mediation process.

An important requirement of any probate system is the preservation of the family. The Contest Model provides no consideration for the possibility that families will be torn apart during the litigation process. Mediation has the advantage of potentially keeping the family together.<sup>118</sup> In fact, mediation is often used in a situation in which a relationship, be it a business partnership or a marriage, needs to be maintained.<sup>119</sup> Discussion of specific elements of the will in a calm and logical manner with a neutral facilitator can prevent feelings of hostility and resentment and keep the testator and the presumed

---

<sup>114</sup> See *id.* at 399. Because mediation disputes do not become part of the public record, a participating family can be assured that secrets will be kept confidential.

<sup>115</sup> See Patricia Monroe Wisnom, *Probate Law and Mediation: A Therapeutic Perspective*, 37 ARIZ. L. REV. 1345, 1360 (1995).

<sup>116</sup> See *id.* at 1352.

<sup>117</sup> See *id.* at 1358-1361.

<sup>118</sup> See Gary, *supra* note 113, at 398.

<sup>119</sup> See Stanard T. Klinefelter & Sandra P. Gohn, *Alternative Dispute Resolution: Its Value to Estate Planners*, EST. PLAN., May/June 1995, at 147, 149.

heir in a civilized relationship.<sup>120</sup> Mediation works to keep its participants in a healthy relationship because it forces the two parties to work together to reach a solution.<sup>121</sup> In doing so, each side begins to understand the views of the other. On the other hand, mediation does not force the parties to take opposing stances as litigation does. Litigation always results in only one winner, while mediation seeks victories on all sides.<sup>122</sup>

One factor that prevents individuals from using antemortem probate is the cost. As previously mentioned, the cost of litigation can sometimes dwindle an estate down to nothing. The purpose of a will is to distribute the assets of an estate. A testator may think twice about initiating an action to preserve his will if the results will reduce the estate by depleting his current funds. Alternative dispute resolution methods such as mediation are usually substantially cheaper than litigation.<sup>123</sup>

Finally, mediation allows for unique remedies.<sup>124</sup> Participants are allowed to construct the "settlement" in any matter they choose. They are not limited to monetary rewards and legal dispositions of property. Splitting property can involve different methods of evaluation, including sentimental attachment as opposed to monetary value.<sup>125</sup> Specific changes to a will may or may not result. The testator's will may remain intact, the result of successful mediation being nothing more than an exchange of hurt feelings and explanations.

## B. Use of Mediation in Other Areas of Law

Mediation has been used successfully in the areas of divorce and elder law. Like probate disputes, both divorce and elder law involve emotional conflicts between family members. In divorce matters, mediation use has been

---

<sup>120</sup> See Dominic J. Campisi, *Using ADR in Property Disputes*, PROB. & PROP., May/June 1995, at 50, 52.

<sup>121</sup> See Gary, *supra* note 113, at 428.

<sup>122</sup> See *id.* Litigation is often characterized as a "win-lose" situation where even the winner may come out feeling that she has lost. Gary points to a Voltaire quotation used in an article on recommendations for domestic relations reform: "I was never ruined but twice—once when I lost a lawsuit, once when I won one." *Id.* at 428 n.178. Conversely, even though mediation results in a single determination of the issue, usually both sides feel as though their needs have been met.

<sup>123</sup> See Rudolph J. Gerber, *Recommendation on Domestic Relations Reform*, 32 ARIZ. L. REV. 9, 11 (1990). Gerber mentions that California's mandatory mediation program for custody disputes costs on average one-fourth the cost of trials. See *id.*

<sup>124</sup> See Gary, *supra* note 113, at 429.

<sup>125</sup> See *id.* at 430.

growing because, unlike litigation, mediation tries to ensure that the family members will help establish a healthy relationship.<sup>126</sup> Being forced into opposite corners does not allow a divorcing couple the cooperative relationship necessary for resolving future conflicts over matters like child support and custody.<sup>127</sup> Elder law has benefited from mediation techniques because work with elderly clients often involves difficult decisions and tremendous amounts of grief.<sup>128</sup> For example, health care decisions and matters involving guardianship of older parents and family members have adapted well to mediation.<sup>129</sup> In light of these successes, commentators have called for an increase in the use of mediation in probate.<sup>130</sup> The growth of mediation in the general area of probate law seems certain, and its application to antemortem probate is natural.<sup>131</sup>

### C. Potential Problems of Mediation in Probate Matters

Mediation, of course, has its share of potential problems—the potential for imbalances of power and the possibility of emotion too great to allow effective mediation.<sup>132</sup> These difficulties are not fatal to the model; a well-trained mediator can avoid them. Mediation of divorce disputes often involves imbalances of power, and it is a recognized task of the mediator to “level the playing field.”<sup>133</sup> Using settlement techniques, the mediator is capable of placing the powerful testator, who literally holds the key to the estate, on the same level as his potential heirs. Postmortem probate mediation is usually hampered by the overwhelming grief of its participants.<sup>134</sup> Although

---

<sup>126</sup> See Gerber, *supra* note 123, at 14–15.

<sup>127</sup> See *id.* at 15. For an interesting discussion of the benefits of family mediation, see Judge Marietta Shipley, *Family Mediation in Tennessee*, 26 U. MEM. L. REV. 1085 (1996).

<sup>128</sup> See Clifton B. Kruse, Jr., *The Elder Law Attorney: Working with Grief*, 3 ELDER L.J. 99, 100–101 (1995).

<sup>129</sup> See Gary, *supra* note 113, at 406–414.

<sup>130</sup> See, e.g., Hewitt, *supra* note 21.

<sup>131</sup> See Hon. John A. Berman & Neil W. Kraner, *Alternate Dispute Resolution in Connecticut Probate Courts*, 11 QUINNIPIAC PROB. L.J. 29, 29 (1997) (noting the “inherent mediation-like quality of probate court proceedings”).

<sup>132</sup> See Gary, *supra* note 113, at 432.

<sup>133</sup> See FOLBERG & TAYLOR, *supra* note 112, at 184–185. Power imbalances and destructive emotions are prevalent in divorce cases where one of the individuals has been subject to physical and mental abuse. Simple fear of even being in the same room with the former spouse can lead to ineffective mediation. See *id.* at 185.

<sup>134</sup> See Campisi, *supra* note 120, at 52. Grief of participants in postmortem probate is usually overcome by delaying the process and allowing the participants time to grieve.

antemortem probate eliminates considerations of grief, heightened emotions remain. The experienced mediator can best gauge how to conduct the hearing by choosing the appropriate place and time.

#### *D. The Mediation Model of Antemortem Probate*

In 1996, the Supreme Court of Hawai'i, by order and after studying the effects of ADR in probate matters, created a set of mediation rules to work in conjunction with the Hawai'i Probate Rules.<sup>135</sup> At any time during a probate or guardianship matter, the court has the option of ordering the parties to participate in mediation.<sup>136</sup> The parties are free to choose a mediator, but if they are unable to agree on one the court will assign one.<sup>137</sup> The mediator is paid by the parties and may request the presence of all essential individuals.<sup>138</sup> Attorneys are invited to attend, but are not essential. Parties are forced to abide by a set of mediation rules; failure to do so results in sanctions and fines.<sup>139</sup>

The Hawai'i Probate Mediation Rules seem like a good basis for a mediation antemortem probate model. Following the same guidelines as the Hawai'i rules, a mediation antemortem probate system would address the concerns raised by the problems of confidentiality, notice and service of process, certainty and finality, and the preservation of family relationships.

##### *1. The Process*

Upon petition to the court for a declaration of validity, the court could order all necessary and interested parties into mediation. Because the process

---

Even with the additional time, most participants feel hopeless and incapable of defending their positions effectively. *See id.*

<sup>135</sup> *See* Gary, *supra* note 113, at 435. A task force was implemented in 1995 by Chief Justice Ronald T.Y. Moon to study the efficacy of mediation in probate matters. Chief Justice Moon had been crucial in the development of ADR rules in other areas of Hawai'i law. *See id.*

<sup>136</sup> *See* HAW. PROB. R. 2.1.

<sup>137</sup> *See* HAW. MEDIATION R. 4. Qualifications of the mediator are not specified by the Hawai'i Rules. The rules do not require that the mediator be experienced in probate matters either, but the Center for Alternative Dispute Resolution will offer training in probate mediation. *See* Gary, *supra* note 113, at 436.

<sup>138</sup> *See* Gary, *supra* note 113, at 436.

<sup>139</sup> *See id.*

would not be the litigation of a case or controversy, the service of process rules could be relaxed. Even service by publication to parties named in the will and those who may take by intestacy would be more than sufficient. The mediation process would not be a part of the public record and all matters discussed would be kept confidential. The mediation would not be binding, but the fact that the court is closely tied to the process should give the mediation result great weight in subsequent litigation.

The mediator need not be well versed in the intricacies of probate law, for the focus should be on maintaining the needs of the family. As the Hawai'i rules recommend, a state ADR agency could assist nonlawyer mediators with the specifics of the law being applied. Unlike the Contest and Administrative Models, the cost of the mediator should be shared by all parties involved, not just the testator.<sup>140</sup> The reduced cost to the testator, the individual bringing the action, could encourage the use of the antemortem process. If the parties cannot agree upon the choice of mediator, the probate court could appoint one.

The question of who would use a mediation antemortem probate process may dictate the form that the process should take. It has been suggested that the antemortem statutes currently enacted are used most by elderly testators who have large estates and are at the greatest risk of being found incompetent, presumably because of senility.<sup>141</sup> Mediators familiar with the problems of the elderly could be included on the list of court-recommended mediators. Also, a fine imposed upon participants who do not comply with the mediation rules may be the best deterrent to an individual who wishes to preserve his or her estate at all costs.

## 2. Confidentiality

One of the biggest advantages to the mediation model of antemortem probate is that, unlike contest litigation, the proceeding does not become a matter of public record. Testators may be encouraged to use the antemortem

---

<sup>140</sup> The terminology used to refer to the parties involved (testator and heirs) could have curious consequences. In his concurrence in *Lloyd v. Wayne Circuit Judge*, Justice Campbell adhered to "the maxim that the living can have no heirs." 23 N.W.2d 28, 30 (Mich. 1885) (Campbell, J., concurring). To correct this linguistic quirk, parties adverse to the testator can be referred to as "potential heirs."

<sup>141</sup> See Fink, *supra* note 51, at 289. Fink suggested that wealthy testators with no immediate family, but plenty of distant relatives, may be the most fearful of will contests. Antemortem probate statutes would probably also be used by owners of more modest estates who intend to intentionally disinherit close relatives such as sons and daughters. See *id.*

statute if they are assured that family secrets will not be disclosed to the public. The Contest Model provides no such assurances, as testimony regarding the sanity and capacity of the testator as well as the contents of the will itself are revealed for all in the community to see.<sup>142</sup> The testator would probably also be more willing to reveal the contents of the will to his family and friends, knowing that a trained mediator will be present to check any heated emotions.

### 3. *Notice and Service of Process*

Because the mediation procedure is not formal litigation, the worries of proper service of process and notice are avoided. Because wills are ambulatory and can be changed at many points in time before the death of the testator, it is often difficult to determine exactly who may be an interested party to the conflict. Although the notice requirements are not at issue in mediation, the fact remains that all interested parties and potential heirs should be present in order to voice their concerns. All efforts should be made to contact those who may receive property under the will or through intestacy.

### 4. *Certainty and Finality*

While the Conservatorship and Contest Models assure the testator that the determination of the will's validity will be final, the Mediation Model could not offer the same guarantees. The mediator's decision is not binding, and those unhappy with the final resolution are free to take the matter to court following the process. However, it is important to remember that most participants of mediation leave the process satisfied.<sup>143</sup> Although the mediation process is not binding upon the parties, the core dispute should be settled leaving no need for further litigation. After having the opportunity to express the frustrations involved in the family dispute, potential heirs should not feel the need to "win." Unlike the Administrative Model, which is neither binding nor answers the underlying emotional problems in the dispute, the Mediation Model would offer finality in the sense that the testator and his potential heirs have reached an understanding.

The fact that the mediation process is closely connected to, and mandated by, the probate court could offer some assurance that the decision reached in

---

<sup>142</sup> See *id.* at 290. The contents of a will are necessarily exposed in litigation so that the opposing party can prove undue influence due to the allocation of assets.

<sup>143</sup> See FOLBERG & TAYLOR, *supra* note 112, at 12-13.

mediation is fairly certain. Like the *notaire* in France, the mediator's judgment would be trusted by the court and difficult to overcome.

### 5. *Maintenance of Family Relationships*

The Contest, Administrative, and Conservatorship Models of antemortem probate do not sufficiently handle the problem of the complexity of the family. Unlike litigation involving distant strangers, family disputes need to be managed in a manner that preserves the relationships. Mediation is uniquely designed to accomplish such a task. An experienced mediator knows how to diffuse heated arguments and strengthen the relationship between the participants. The ability of the Mediation Model to account for heightened emotions makes it well suited to current application.

## VII. CONCLUSION

Any approach to dealing with the problems of probate should focus on the similarities between family law and probate. Because probate usually deals with the complex nature of the relationship between family members, the processes used to handle disputes between impersonal corporations and strangers should not apply. Recognizing the presence of heightened emotions and a need to keep the family relationship together, a mediation model of antemortem probate could resuscitate a valid, yet under-used, idea.